



**Coimisinéir um Fhaisnéis Comhshaoil**  
**Commissioner for Environmental Information**

**Decision of the Commissioner for Environmental Information on an appeal made under article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations)**

**Case CEI/18/0027**

**Date of decision:** 10 July 2018

**Appellant:** Mr XY

**Public Authority:** Fingal County Council

**Issues:** Whether the Council was justified in refusing access to the waste destination data in the 2017 Annual Environmental Reports (AER) submitted by a named third party company

**Summary of Commissioner's Decision:** The Commissioner found that while article 9(1)(c) applied to the information, the public interest in disclosure outweighed the interests served by refusal. Accordingly, he annulled the Council's decision and required it to make the withheld environmental information available to the appellant.

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

## **Background**

Waste collection permits include conditions requiring the permit holder to compile and maintain information concerning their waste collection activity, for example the quantity of waste collected and the facility it was collected from or delivered to. This information is then given to the relevant nominated authority through an Annual Return procedure also referred to as an Annual Environmental Report (AER).

On 16 June 2018 the appellant requested a copy of the latest AER submitted by a named third party company. The Council informed the appellant on 12 July 2018 that it had made a decision part granting access to the 2017 AER. It refused access to certain information in the 2017 AER including the waste destination data on the basis the information was commercially or industrially sensitive and fell under the exception in article 9(1)(c) of the AIE Regulations.

On 26 July 2018 the appellant requested an internal review of the Council's decision to redact the waste destination data. He stated that he believed it is in the public interest for the information to be disclosed. The Council made its internal review decision on 24 August 2018 affirming its decision to refuse access to the waste destination data under article 9(1)(c). Its decision cited my decision in Case CEI/17/0005 (SLR Environmental Consulting (Ireland) Limited and Offaly County Council), available at [www.ocei.ie](http://www.ocei.ie), in support of its position.

The appellant appealed the Council's refusal of access to the waste destination data to my Office on 24 August 2018.

In carrying out my review I had regard to the submissions made by the appellant and the Council. I also had regard to:

- the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance),
- Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based,
- the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), and
- the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (the Aarhus Guide).

## **Analysis and Findings**

Article 9(1)(c) provides that a public authority may refuse to make environmental information available where disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

In order to find that article 9(1)(c) applies to information, I need to be satisfied that:

- The information at issue is commercially or industrially confidential.
- The confidentiality of the information is provided for in national or Community law to protect a legitimate economic interest.
- Disclosure would adversely affect that confidentiality.

As noted above, the Council cited my decision in Case CEI/17/0005 in support of its refusal of access to the waste destination data. I am not bound to follow previous decisions, I conducted a fresh review of all aspects of this appeal and decided it on its own merits. In Case CEI/17/0005, I focussed on the common-law equitable duty of confidence in relation to

the test of whether confidentiality is provided for in national or Community law. I note that the Council states that "there exists an expectation of confidentiality in relation to some of the information provided by the permit holders". My investigator wrote to the Council asking it to explain how or why it came to the conclusion that the permit holder expects confidentiality in relation to the waste destination data. The Council did not provide a response to this query. On the evidence before me I am not convinced that the waste destination data was given to the Council in circumstances imposing an obligation of confidence on it. Therefore, I am not satisfied that the waste destination data in this case meets the requirements of the common law equitable duty of confidence as summarised by Fennelly J. in the Supreme Court judgment in *Mahon v Post Publications* [2007] IESC 15.

The waste company whose AER is the subject of the request was invited to make submissions as a third party to this case. It submits that waste destination data is commercially sensitive. I consider that section 36 of the Freedom of Information Act 2014 (FOI Act) is the relevant national law in the current case.

Section 36(1) of the FOI Act provides that subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains—

- (b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation.

Section 36(2) provides that a head shall grant an FOI request to which subsection (1) relates if—

- (a) the person to whom the record concerned relates consents, in writing or in such other form as may be determined, to access to the record being granted to the requester concerned,
- (b) information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public,
- (c) the record relates only to the requester,
- (d) information contained in the record was given to the FOI body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or
- (e) disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment, but, in a case falling within paragraph (a) or (c), the head shall ensure that, before granting the request, the identity of the requester or, as the case may be, the consent of the person is established to the satisfaction of the head.

I have no information to show that any of the conditions set out in subsection (2) apply in this case. In particular, I note that the third party does not consent to the release of the waste destination data.

The Council in its internal review states that "there exists a risk that disclosure of the waste destinations could have a detrimental effect on the operation of this part of the waste industry". In the part of its decision addressing the public interest it indicates that disclosure of the information would negatively impact on the waste market which is a competitive market with many operators. My investigator asked the Council to explain how the waste destination data is commercially sensitive and how disclosure of it would have an adverse

impact. However, the Council did not respond to this query to explain how or why the Council considers that disclosure of the information would have such a detrimental effect.

The third party submits that the waste destination could give a competitor an in-depth knowledge of its business and that this could have a severe impact on its business and customer base. It states this could affect its ability to continue to provide employment to its staff and prevent future growth of its business.

The appellant rejects the argument that disclosure of the waste destination data could interfere with the ability of small waste companies to compete with larger waste companies. He notes that AERs for waste management facilities which produce annual returns for the Environmental Protection Agency (EPA) are published on the EPA's website including the waste destination data. He submits that larger companies are aware of all available authorised waste outlets for each waste material and as a result will not gain a commercial advantage by examining the outlets used by smaller companies. The appellant states that all authorised waste outlets are listed on the EPA's website or the National Waste Collection Permit Office's (NWCPO) website and that the NWCPO facilitates searches for authorised waste outlets by specific categories of waste using a waste code - EWC Code.

In Case [CEI/17/0044](#) (Conor Ryan & Offaly County Council), available at [www.ocei.ie](http://www.ocei.ie), which my investigator brought to the attention of the parties to this case, and in previous cases, I found that where the information is commercial in nature i.e. where it relates to the sale or purchase of goods or services, usually for profit, section 36(1) of the FOI Act provides for the protection of commercial confidentiality in order to protect economic interests, subject to a public interest test. The third party relies on the fact that, in its view, disclosure of the waste destination data would prejudice its business. I accept that the waste destination data is commercial in nature.

The essence of the test in section 36(1)(b) is not the nature of the information but the nature of the harm which might be occasioned by its release. The harm test in the first part of section 36(1)(b) is that disclosure "could reasonably be expected to result in material loss or gain". I take the view that the test to be applied is not concerned with the question of probabilities or possibilities but with whether the decision maker's expectation is reasonable. The harm test in the second part of section 36(1)(b) is that disclosure of the information "could prejudice the competitive position" of the person in the conduct of their business or profession. The standard of proof to be met here is lower than the "could reasonably be expected" test in the first part of the exemption. However, as Information Commissioner, I have taken the view that, in invoking "prejudice", the damage which could occur must be specified with a reasonable degree of clarity.

I am prepared to accept the third party's submission that disclosure of the waste destination data could give the third party's competitors some knowledge of its business that they would not otherwise have and in turn "could prejudice" its competitive position. For example, if other companies in the sector knew the destination in Ireland or elsewhere of facilities that accept waste from the third party they might target these and thus affect the third party's competitiveness. I am therefore prepared to accept that section 36(1)(b) of the FOI Act 2014 applies to the waste destination data in the AER.

I accept that the waste destination data continues to be treated by the third party and the Council as confidential. I am satisfied, in the circumstances, that disclosure of that information would result in the loss of its confidential quality and that the purpose of such confidentiality is the protection of legitimate economic concerns of the companies. I am therefore satisfied that disclosure of the withheld information would adversely affect

commercial confidentiality. I find that, subject to the weighing of the public interest, article 9(1) (c) of the AIE Regulations applies to the information.

### **The Public Interest**

Article 10(3) provides that the public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal. Article 10(4) provides that the grounds for refusal must be "interpreted on a restrictive basis". The public interest balancing test in section 36 of the FOI Act is not identical to the requirement of article 10(3) of the AIE Regulations. However, for the purposes of this case, the relevant factors to be considered are common to both and I will deal with them together.

The Council acknowledges that there is a public interest in disclosure of the waste destination data. In favour of disclosure of the waste destination data, the Council states that it considered the interest in the openness and transparency of how the waste industry carries out its business which is vital for the protection of the environment. However, it states that this public interest is satisfied by the fact that the industry is regulated and as part of that regulation it is required to produce annual returns to public authorities which can enforce conditions on the waste companies. In favour of the interest in maintaining the article 9(1)(c) exception i.e. refusal, it states that disclosure of the waste destination data would potentially cause a negative impact on the waste market. It states that "the public interest is better served by having a vibrant, competitive market with many operators and that anything which might negatively impact on the market would be detrimental". It concludes that, in its view, the public interest is better served by the non-disclosure of the waste destination data.

The appellant submits that section 32 of the Waste Management Act 1996 (as amended) (1996 Act) places legal obligations on waste producers, including obligations with regard to the final destination of waste that is collected. He states that if a person gives waste to a waste collector, the waste producer has a right to know the destinations used. He says that if a person has access to waste destination data, they would be able to carry out due diligence in advance of selecting a waste management company. He further submits that tracking waste destinations is a key environmental protection measure and that the more eyes looking at the data the greater the likelihood that false information and unexplained anomalies will be revealed, thereby, contributing to greater enforcement in the waste industry. He concludes that the public interest in having full access to the waste destination data reported in the AER outweighs any other interests.

In Case CEI/17/0044, I stated that it is important to have regard to the purposes of the AIE regime in considering the public interest served by disclosure under AIE which includes facilitating public participation in environmental decision making with the aim of leading to a better environment, as reflected in Recital (1) of the Preamble to the Directive.

I am mindful also that section 11(3) of the FOI Act requires public bodies to have regard to the need to achieve greater openness in their activities and inform scrutiny, discussion, comment and review by the public of their activities. I consider this to be relevant to my assessment under section 36(3) as to whether it would be contrary to the public interest to release financial information.

On the other hand, both the AIE regime and the FOI Act recognise a public interest in restricting access to certain information. Competing interests must be assessed in order to weigh the public interest in favour of disclosure against the potential harm that might result from that disclosure. The public interest in openness and accountability is not limited to the expenditure of public funds. I consider that there is a very strong public interest in optimising transparency and accountability in relation to the manner in which agents of the State

(including NWCPO and the Council), carry out their regulatory functions in relation to waste permits.

As I noted in Case CEI/17/0044, recent reports surrounding the management of waste and the enforcement of waste management legislation in Ireland have raised serious questions as to whether the public interest is sufficiently secured by public servants having access to the waste information. This is relevant to the Council's determination that the public interest in disclosure of the waste destination data is satisfied through oversight by public bodies. There is a lack of confidence in Ireland's ability to manage waste properly. There is a substantial public interest in the disclosure of the information because such disclosure would facilitate further public scrutiny on waste-management, and may even lead to the identification of gaps in enforcement. In addition, I think that there is a public interest in waste producers being able to track the destination of their waste; this would facilitate the making of informed decisions about which waste collectors they opt to use to dispose of their waste.

The interests served by refusal are primarily those of protecting the legitimate economic interests of the third party from unnecessary prejudice. While there is a strong public interest in third parties being able to conduct commercial transactions with public authorities without fear of suffering commercially as a result, what is at issue here is not a commercial transaction with the Council but a mandatory requirement as part of the Council's regulatory function.

Having considered all of the above, the arguments of the parties, and the public interest under article 10(3) of the AIE Regulations, I find that, in this particular case, the public interest in disclosure outweighs the interests served by refusal.

### **Decision**

I find that article 9(1)(c) of the AIE Regulations applies to the information at issue, but the public interest in disclosure outweighs the interests served by refusal under that article. Accordingly, I annul the Council's decision and require it to make available to the appellant the waste destination data in the 2017 AER.

### **Appeal to the High Court**

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Peter Tyndall  
Commissioner for Environmental Information  
10 July 2019